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YEOH SIEW KEAN v. TAY & HELEN WONG

COURT OF APPEAL, PUTRAJAYA
ABDUL AZIZ ABDUL RAHIM JCA
MAH WENG KWAI JCA
PRASAD SANDOSHAM ABRAHAM J
B [CIVIL APPEAL NO: B-02-(NCVC)(W)-2813-12-2013]
4 DECEMBER 2014

C ***TORT:*** *Negligence – Duty of care – Professional negligence – Action by client against solicitor – Advice to client to terminate sale and purchase agreement – Whether solicitor liable for giving negligent advice – Whether negligent advice caused client to be precluded from claiming specific performance and/or damages in lieu – Whether client established entitlement to damages if solicitor had rendered proper advice – Whether client must be compensated on restitutio in integrum basis*

D ***LEGAL PROFESSION:*** *Duty of care – Negligence – Action by client against solicitor – Advice to client to terminate sale and purchase agreement – Whether solicitor liable for giving negligent advice – Whether negligent advice caused client to be precluded from claiming specific performance and/or damages in lieu of – Whether client established entitlement to damages if solicitor had rendered proper advice – Whether client must be compensated on restitutio in integrum basis*

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The respondents ('the defendants'), a firm of solicitors, prepared a sale and purchase agreement ('the said agreement') between the appellant ('the plaintiff') and one Badardin. Badardin agreed to purchase from the plaintiff, 30,000 shares in a company known as Stradom Teah Sdn Bhd for
F the sum of RM1.5 million. Accordingly, Badardin paid RM200,000 as deposit and a further sum of RM350,000 to the plaintiff. Subsequently, Badardin deposited a post-dated cheque ('PDC') for the sum of RM950,000 with the plaintiff to be cleared by 31 March 2005 (balance purchase price that was to be paid by the completion date). However, Badardin applied for an extension of time to pay the balance purchase price but it was refused by
G the plaintiff. The plaintiff went on to present the PDC to the bank for clearance but the PDC was dishonoured. In consequence, the plaintiff, based on the defendant's instructions issued a letter of termination of the said agreement. The agreement was subsequently terminated and the plaintiff proceeded to enforce her rights according to said agreement. However, the
H plaintiff contended that based on the alleged negligent advice and breach of duty by the defendant *ie*, in advising the plaintiff to terminate the said agreement, the plaintiff was deprived of a remedy of specific performance and/or damages *in lieu* in the region of RM950,000 being the balance purchase price. On the contrary, the defendant denied the same and argued
I that it acted in accordance with the instruction of the plaintiff. The trial judge found that the defendant acted in accordance with the instructions of the plaintiff and was not negligent. Hence the present appeal.

Held (allowing appeal in part)
Per Prasad Sandosham Abraham J delivering the judgment of the court:

(1) Based on the evidence, it was clear that the defendant had advised the plaintiff on steps and consequences flowing from cls. 6.11 and 7.4 of the said agreement. Despite being aware that the plaintiff's predominant purpose was to secure and receive the RM950,000, the defendant had advised termination of the agreement which excluded the right of specific performance and/or damages *in lieu*. The plaintiff was now only entitled to forfeit the deposit paid. The defendant had failed to explain to the plaintiff, who was a lay person, the legal implications of the steps taken. Thus, the defendant had breached its duty of care to the plaintiff. The High Court Judge failed to appreciate the broader scope of the duty of care owed by the defendant to the plaintiff and the adequacy of advice rendered by the defendant. (paras 4, 6 & 7)

(2) The plaintiff's pleaded case against the defendant was for negligence. To suggest that the plaintiff would be able to recover the sum of RM950,000 as a consequence of the defendant's breach was not the test for the measure of damages in tort. The general rule was that the plaintiff must be compensated on a *restitutio in integrum* basis ie to put the plaintiff back to the position before the breach of the duty of care took place. As to the quantification of damages, the plaintiff had failed to establish that she would be entitled to the sum of RM950,000 if the defendant had properly advised the plaintiff. (paras 10 & 13)

(3) The said shares remained with the plaintiff and no evidence was led to show that any attempt was made to resell the shares to mitigate losses. Also, there was no evidence to show that the value of the said shares had dropped and/or the marketability of the said shared had been effected. Further, in the plaintiffs statement of claim, it was clearly stated that the plaintiff was entitled to forfeit the deposit sum of RM200,000 and there was an order for the said sum to be forfeited. For these reasons, the court allowed the appeal in part by reversing the trial judge's finding that the defendant was not negligent and dismissed the plaintiff's claim of RM950,000 for damages as the plaintiff had failed to prove her claim for damages. (paras 17 & 19)

Bahasa Malaysia *Translation Of Headnotes*

Defendan, sebuah firma peguam telah menyediakan satu perjanjian jual beli ('perjanjian tersebut') antara plaintif dan satu Badardin. Badardin telah bersetuju untuk membeli daripada plaintif 30,000 saham dalam syarikat yang dikenali sebagai Stradom Teah Sdn Bhd pada harga RM1.5 juta. Berikutan itu, Badardin telah membayar RM200,000 sebagai deposit dan sejumlah wang sebanyak RM350,000 kepada plaintif. Kemudian, Badardin telah mendepositkan satu cek bertarikh tertunda ('PDC') bagi jumlah sebanyak RM950,000 dengan plaintif untuk pembayaran sebelum 31 Mac 2005 (baki

A harga belian yang perlu dibayar sebelum tarikh penyelesaian). Walau bagaimanapun, Badardin telah memohon lanjutan masa untuk membayar baki harga belian tetapi telah ditolak oleh plaintif. Plaintif seterusnya telah mengemukakan PDC kepada bank untuk pembayaran tetapi PDC tersebut telah dikembalikan. Justeru, plaintif atas arahan defendan, telah
B mengeluarkan surat untuk menamatkan perjanjian tersebut. Perjanjian tersebut telah ditamatkan dan plaintif kemudiannya, meneruskan untuk menguatkuasakan haknya di bawah perjanjian tersebut. Walau bagaimanapun, plaintif menghujahkan bahawa berdasarkan nasihat cuai yang diberikan oleh defendan dan pelanggaran kewajipan oleh defendan, iaitu
C memberi nasihat kepada plaintif untuk menamatkan perjanjian tersebut, plaintif telah dinafikan haknya untuk remedi pelaksanaan spesifik dan/atau ganti rugi dalam lingkungan RM950,000 iaitu baki harga belian. Sebaliknya, defendan telah menafikan perkara tersebut dan menghujahkan bahawa ia telah bertindak mengikut arahan plaintif. Hakim bicara telah membuat dapatan bahawa defendan telah bertindak mengikut arahan plaintif dan tidak
D cuai. Oleh itu rayuan ini.

Diputuskan (membenarkan sebahagian rayuan)
Oleh Prasad Sandosham Abraham H menyampaikan penghakiman mahkamah:

E **(1)** Berdasarkan keterangan, adalah jelas bahawa defendan telah menasihatkan plaintif mengenai langkah-langkah dan kesan berikutan kl. 6.11 dan 7.4 perjanjian tersebut. Walaupun menyedari bahawa tujuan utama plaintif adalah untuk mendapatkan dan menerima RM950,000 tersebut, defendan telah menasihatkan penamatan perjanjian yang
F mengecualikan hak untuk mendapatkan remedi pelaksanaan spesifik dan/atau ganti rugi. Plaintif kini hanya berhak untuk melucutkan deposit yang telah dibayar. Defendan telah gagal untuk menjelaskan kepada plaintif, yang merupakan seorang awam, implikasi undang-undang mengenai langkah-langkah yang diambil. Oleh itu, defendan
G telah melanggar kewajipannya berjaga-jaga kepada plaintif. Hakim Mahkamah Tinggi gagal mempertimbangkan skop yang lebih luas kewajipan berjaga-jaga oleh defendan kepada plaintif dan kecukupan nasihat yang diberikan oleh defendan.

(2) Kes yang diplidkan oleh plaintif terhadap defendan adalah untuk
H kecuaian. Cadangan bahawa plaintif akan mendapat jumlah wang sebanyak RM950,000 akibat daripada pelanggaran defendan bukanlah ujian untuk mentaksir ganti rugi dalam tort. Peraturan am adalah bahawa plaintif harus diberi pampasan berasaskan *restitutio in integrum* iaitu untuk meletakkan plaintif kembali ke kedudukan sebelum
I pelanggaran kewajipan berjaga-jaga berlaku. Mengenai kuantifikasi ganti rugi, plaintif gagal membuktikan bahawa dia akan berhak mendapat jumlah wang sebanyak RM950,000 jika defendan telah dengan betul menasihatkan plaintif.

(3) Saham-saham tersebut masih kekal dengan plaintif dan tiada keterangan yang dikemukakan untuk menunjukkan bahawa apa-apa percubaan telah dibuat untuk menjual semula saham bagi mengurangkan kerugian. Juga, tiada keterangan yang menunjukkan bahawa nilai saham tersebut telah menurun dan/atau kebolehpasaran saham-saham tersebut telah terjejas. Di samping itu, dalam penyata tuntutan plaintif, telah dinyatakan dengan jelas bahawa plaintif berhak untuk melucutkan wang deposit sebanyak RM200,000 dan adanya perintah untuk jumlah tersebut dilucutkan. Untuk sebab-sebab ini, mahkamah membenarkan sebahagian rayuan dengan mengakas keputusan hakim bicara bahawa defendan tidak cuai dan menolak tuntutan plaintif bagi RM950,000 sebagai ganti rugi kerana plaintif gagal membuktikan tuntutan ganti ruginya.

Case(s) referred to:
Allied Maples Group Ltd v. Simmons & Simmons [1995] 1 WLR 1602 CA ***(refd)***
Credit Lyonnais SA v. Russell Jones & Walker (a firm) [2003] Lloyd's Rep PN 7 ***(refd)***
Edwards v. Lee [1991] 141 NLJ 1517 ***(refd)***
Hotson v. East Berkshire Health Authority [1987] 1 AC 750 HL ***(refd)***
Saif Ali v. Sydney Mitchell & Co [1980] AC 198 ***(refd)***

Other source(s) referred to:
Nurchaya Talib, *Law of Torts in Malaysia*, p 398

For the appellant - Brijinandan Singh Bhar (Dheeraj Bhar with him); M/s Brijnandan Singh Bhar & Co
For the respondent - Ranjit Singh (Adeline Yew & Sheela Menon with him); M/s Ranjit Singh & Yeoh

[Appeal from High Court, Shah Alam; Civil Suit No: 22NCVC-115-01-2012]

Reported by Sandra Gabriel

JUDGMENT

Prasad Sandosham Abraham J:

[1] This appeal arises out of a judgment of the High Court Shah Alam dismissing the plea of negligence against the respondent and ensuing damages therein. For purposes of convenience, the appellant will be referred to as the plaintiff and the respondent as the defendant.

[2] The material facts relevant to the present appeal are set out as follows:

(i) the defendant were a firm of solicitors who were approached by the plaintiff to prepare a sale and purchase agreement dated 17 August 2005 (the said agreement) between the plaintiff and one Badardin Bin Ahmad (Badardin) where Badardin agreed to purchase from the plaintiff 30,000 shares in a company known as Stradom Teah Sdn Bhd (the company) for a sum of RM1.5 million (See rekod rayuan jilid 4 bahagian C pp. 597 to 610);

(ii) Badardin paid RM200,000 as a deposit and a further sum of RM350,000 (not in dispute). Badardin deposited a post dated cheque for sum of RM950,000 with the plaintiff to clear by 31 March 2005, ie, the balance purchase price that was to be paid (ie, the completion date) Badardin applied for an extension of time to pay the said balance purchase price which the plaintiff refused and proceeded to present the said cheque but Badardin stopped payment and the said cheque was dishonoured (See rekod rayuan jilid 4 bahagian C pp. 620 to 621 on the 1 April 2005);

(iii) on the 1 April 2005, the defendant, purportedly based on the plaintiff's instructions issued a letter of termination of the said agreement pursuant to cl. 6.11 of the said agreement. (See rekod rayuan at p. 605 jilid 4 bahagian C); and

(iv) the defendant issued a further letter dated 13 April 2005 giving Badardin till 1 May 2005 to remedy the breach failing which the plaintiff would exercise her rights under the said agreement. On the 3 May 2005, Badardin accepted the termination. On the 25 May 2005, the defendant wrote to the solicitor for Badardin that the plaintiff was now enforcing her rights under the said agreement pursuant to cl. 7.4 of the said agreement.

Issues Relating To The Appeal

[3] The plaintiff contend that by terminating the said agreement, the plaintiff had lost the right to pursue a claim for specific performance of the said agreement and/or damages *in lieu* bearing in mind the defendant was well aware that the plaintiff wanted the claim for RM950,000 to be preserved. Based on alleged negligent advice by the defendant the right to specifically enforce the said agreement and/or damages *in lieu* of specific performance had been precluded by the said termination.

[4] The defendant denies the same and says it acted in accordance with the instructions of the plaintiff.

[5] No evidence of loss and/or damage as alleged by the plaintiff had been proved.

Alleged Negligence Of The Defendant

[6] Having evaluated the exchange of correspondence (see p. 172 rekod rayuan jilid 4 bahagian D) and emails it is clear that the defendant had advised the plaintiff on steps and consequences flowing from cls. 6.11 and 7.4 of the said agreement. (Despite being aware that the plaintiff's predominant purpose was to secure and receive the RM950,000 (at pp. 631 to 632 rekod rayuan jilid 4 bahagian C)) yet the defendant had advised termination of the said agreement which excluded the right of specific performance and/or damages *in lieu*. As it now stands the plaintiff was now only entitled to the forfeiting of the deposit paid.

[7] An advocate and solicitor in determining a cause of action to be taken, must act on instructions from the client. However those instructions are predicated on sound and reasoned advice from the advocate and solicitor in question. Lord Salmon in the case of *Saif Ali v. Sydney Mitchell & Co* reported in [1980] AC p. 198 at 218 said and I quote:

> The normal rule applied by the law is that if any one holding himself out as possessing reasonable competence in his vocation undertakes to advise or to settle a document, he owes a duty to advise or settle the document with reasonable competence and care. This duty is owed to anyone he should foresee may suffer loss if the duty is breached. If in breach of that duty, he fails to exercise reasonable competence or care and as a result the person to whom the duty was owed suffers damage he is liable to compensate that person for what damage he has suffered.

[8] We also quote Brooke J in *Edwards v. Lee* reported in [1991] 141 NLJ p. 1517 who held:

> it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave that information or advice when he knew or ought to have known that the inquirer was relying on him.

[9] In our present case we find the defendant had failed to explain to the plaintiff the legal implications of this situation. The defendant should have explained to the plaintiff the steps being taken and should have been alert to a danger of misapprehension on the part of the plaintiff, and should have been willing to clarify with the plaintiff the nature of the advice given and the advice itself as the defendant was well aware the plaintiff was a lay person who steadfastly believed she would be able to claim the RM950,000. In the case of *Credit Lyonnais SA v. Russell Jones & Walker (a firm)* Laddie J reported in [2003] Lloyd's Rep PN 7 Laddie J said at para. 21 and we quote:

> In deciding what are the duties shouldered by a solicitor, the first step is to construe the instructions given by the client and accepted by the lawyer. In doing this, it must be borne in mind that in most cases the client is not a lawyer. He will ask the lawyer to carry out certain tasks for him, although the formulation of those tasks may not be expressed with the precision one would expect of a lawyer. The lawyer accepts the instructions on that basis. If there is a *bona fide* obscurity as to the terms of the instructions, the lawyer should clarify them.

[10] The learned judge in his grounds of judgment found that the defendant had acted in accordance with instructions of the plaintiff and was therefore not negligent. The learned judge failed to appreciate the broader scope of the duty of care owed by the defendant to the plaintiff and the adequacy of advice rendered by the defendant, on which the plaintiff based her instructions and took a rather simplistic approach to the issue. We find that the defendant had breached its duty of care to the plaintiff and we therefore allowed the appeal on liability.

[11] The plaintiff raised the issue of damages and argued that as a consequence of the breach of duty of the defendant to the plaintiff, ie, advising the plaintiff to terminate the said agreement thus depriving the plaintiff of a remedy of specific performance and/or damages *in lieu* thereof, the plaintiff should be entitled to a sum of RM950,000 because of failure to properly advice the plaintiff on the effects of cls. 6.11 and 7.4 of the said agreement, that sum being the balance purchase price.

[12] Had the defendant rendered proper advice, the plaintiff would not be precluded from pursuing a claim for specific performance and/or damages *in lieu* which would be in the region of RM950,000 ie, the balance purchase price which the plaintiff had the opportunity to claim for.

[13] Firstly, it must be borne in mind that the plaintiff's pleaded case against the defendant is in negligence. To suggest that the plaintiff would be able to recover the sum of RM950,000 as a consequence of the defendant's breach is not the test applied for the measure of damages in tort. The general rule is the plaintiff must be compensated on a *restitutio in integrum* basis ie, to put the plaintiff back to the position before the breach of the duty of care took place. The award of damages must be reasonable between the plaintiff and the defendant. It had to take into account a variety of matters and the most important factor is the said shares sold remained in the hands of the plaintiff. In *Hotson v. East Berkshire Health Authority* reported in [1987] 1 AC p. 750 at p. 762, Hammond J in the Court of Appeal thought it better to concentrate on what actually did happen: "A great many solicitor's negligence cases, as to damages turns on 'what if' questions. However, the measure of damages is simply what it costs to remove the blot for the clean title which Mr Benton thought he was getting". As the said shares remain with the plaintiff, the principle of damages assessed as referred to aforesaid does not apply.

[14] As to the quantification of damages the plaintiff must show that she had suffered loss due to the negligent advice of the defendant. It is sometimes a difficult line to cross where causation leading to liability for loss ends and quantification of the amount of the loss begins. It has to be shown by evidence although the plaintiff was very keen to secure the sum of RM950,000 can it be said with certainty the quantum of damages would amount to RM950,000 or that the court would have ordered damages *in lieu* of specific performance.

[15] We refer to the decision of Court of Appeal England in the case of *Allied Maples Group Ltd v. Simmons & Simmons* reported in [1995] 1 WLR 1602 p. 1609 and we quote the relevant parts of His Lordship Stuart Smith's judgment:

> If the Plaintiff would have taken just the same course of action whether or not he got careful advice, he has lost nothing from negligent advice. And the fact of loss, as opposed to its quantification, is an all-or-nothing question to be decided on the balance of probabilities.

[16] In assessing damages, the plaintiff had failed to establish that she would entitled to the sum of RM950,000 on the basis that she would have been entitled to claim that amount if the defendant had properly advised the plaintiff. This proposition is fraught with speculation.

[17] The plaintiff had also failed to show that she took steps to mitigate the loss claimed as she had failed to take reasonable steps to minimise the alleged loss suffered. The plaintiff will not be able to claim any damages due to lack of reasonable steps on the plaintiff's part. This principle is equally applicable in claims for contract and tort. (See Nurchaya Talib, *Law of Torts in Malaysia*, p. 398).

[18] Even though the defendant is generally fully liable for the damage sustained by the plaintiff, the plaintiff has a corresponding duty to minimise his loss. For instance, if a plaintiff loses his job due to an injuries, he should look for alternative employment if he is still capable of working. If he takes a lower paid job, he can only recover from the defendant as lost wages, the difference between his previous and his present earnings. If the value of his damaged property is say, RM50 a plaintiff cannot claim, for instance, RM80 as repair costs, when buying a similar new item would only cost him RM50.

[19] The plaintiff will not be able to claim as damages, any loss that she has incurred due to lack of reasonable steps on her part. What is reasonable depends on the facts and circumstances in each case. Where however, the reasonable steps taken to minimise the consequences of the defendant's tort actually increases the plaintiff's final loss, the increased expenses and loss would still be attributable to the defendant's tort and may be fully recovered from the defendant.

[20] Taking the following into consideration the court is of the view the plaintiff had failed to mitigate her loss (if any) in that:

(i) the said shares remained with the plaintiff;

(ii) no evidence was led to show that any attempt was made to resell the shares to mitigate losses;

(iii) no evidence to show that value of the said shares had dropped and/or the marketability of the said shares had been affected; and

(iv) in the plaintiff statement of claim at pp. 44 to 45 of (rekod rayuan jilid 1 bahagian A) clearly stated that the plaintiff was entitled to forfeit the deposit sum of RM200,000 paid by En Badardin and there was an order from the said sum to be forfeited.

[21] In this regards during the cross-examination the plaintiff (PW1) testified as follows:

> Q: Now look at page 187, sorry Yang Arif, page 186. Question 28. So Miss Yeoh, what is it that you are seeking from court today, question. Answer, next page, I am seeking for the RM950,000 that is due and owing from the Defendant with the final instalment payment under the said agreement, you see that?

A: Yes.

Q: No, because the agreement was terminated, now we're looking at this, there is no specific performance, you are supposed to sell your shares, the shares are still yours correct? Agree or not?

A: To be what?

Q: Yes, now you had sold those shares to En. Badardin for RM1.5 million that is the purchase price in the Sale and Purchase Agreement, correct? Agree?

A: Yes.

Q: In fact he offered you 1.5 and you agreed. Am I right?

A: Yes.

Q: Correct?

A: Yes.

Q: And you would have agreed because you would felt that that was a fair price for the willing buyer, willing seller basis.

A: At that time, yes. At that time the shares were worth a lot.

Q: And therefore you have, you still retain beneficial ownership of those shares, am I right? It's either in your name or you still have the right to that share.

A: If that's the procedure, yes.

[22] For all the aforesaid reasons we find the plaintiff had failed to show that damages were suffered by the plaintiff. On the upshot:

(i) We allowed the appeal in part by reversing the learned judge on his finding that the defendant was not negligent and had acted according to instructions; and

(ii) The part of the appeal of the plaintiff claiming a sum of RM950,000 as damages was dismissed as the plaintiff had failed to prove her claim for damages.